SUPREME COURT, U. S.

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RALPH ARLEE POORE, NEWTON TOWNSEND, EDWARD NIXON, WILLIAM JOSEPH GLASS,
Petitioners,

vs.

JAMES J. MAYER, COMMON PLEAS JUDGE OF RICHLAND COUNTY, OHIO: STATE OF OHIO,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

GERALD A. DONAHUE,
1st Ass't. Attorney General.
State House, Columbus, Ohio,
Counsel for Respondent.

REX LARSON,
WILLIAM F. McKEE,
3 North Main Street, Mansfield, Ohio.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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OPINIONS BELOW

The opinions of the Common Pleas Court and of the Court of Appeals of Richland County, Ohio, in the Poore, Townsend and Nixon cases are unreported. (Appendix A of Petition). The opinion of the Supreme Court of Ohio in the Poore, Townsend and Nixon cases is reported in 176 Ohio St. 78. (Appendix B of Petition).

The opinion of the Court of Appeals of Richland County, Ohio, in the Glass case is unreported. (Appendix C. of Petition). The opinion of the Supreme Court of Ohio in the Glass case is reported in 176 Ohio St. 325. (Appendix D of Petition).

JURISDICTION

The purported jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Do the procedural remedies provided under the law of Ohio present a question for determination in Federal Courts?
2. Do concealed observations of open publicly owned and maintained facilities constitute a search, and if so, is such search unreasonable?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No Federal procedural statutes are involved as only Ohio procedure is involved.

The pertinent provisions of the Constitution which are represented by Petitioner to be involved are set forth in the Petition at Page 3.

STATEMENT

Four cases are included in the Petition of which three are of similar nature, and of which the fourth is completely dissimilar. One similarity is involved in all cases, in that all four Petitioners were indicted for sodomy alleged to have occurred in a publicly owned and operated restroom in the center of the City of Mansfield, Ohio. This restroom which was owned and maintained by the City for the public was an open room with some partial partitions but with no

closed areas, and was subjected to secret police investigation through a two-way glass, mounted in a door to the room.

The decisions of which Petitioners Pooré, Townsend and Nixon complain relate solely to procedural matters within the State of Ohio. The decisions arose from original actions for a writ of prohibition filed by said Petitioners in the Court of Appeals of Richland County, Ohio. The writ filed by said Petitioners not being based upon a verdict or decision in the trial court.

The question presented by Petitioner Glass does reach the merits as to whether or not an unlawful search did in fact exist, as it arises from a conviction following jury trial. This conviction was affirmed in the Court of Appeals and the Supreme Court of Ohio.

ARGUMENT

The decisions below are not in conflict with other decisions, as the decisions in the cases of Petitioners Poore, Townsend and Nixon are based upon established Ohio procedural law.

The decision below in the case of Petitioner Glass arose from surveillance of a publicly owned and maintained restroom which was open for observation as opposed to the decisions of the Supreme Court of California in *Bielicki v. Superior Court*, 21 Cal. Rept. 552; 371 P.2d 288, and *Britt v. Superior Court*, 24 Cal. Rept. 489; 374 P.2d 817, which arose from privately owned facilities which contained closed toilet booths for the public.

I.

THE DECISIONS BELOW ARE CLEARLY CORRECT

The Supreme Court of Ohio under long existing Ohio procedural law determined that a writ of prohibition was not available as a substitute for appeal in an attempt to obtain and advance ruling as to questions of evidence. This precise question had earliar been before the Supreme Court of Ohio in *Villasino v. Maxwell*, 174 Ohio St., 483. In that case the Petitioner also claimed an illegal search and seizure and the Supreme Court of Ohio assumed for purposes of its determination that an illegal search and seizure did produce the evidence against Petitioner. The court then found that even if such evidence which was presented to the Grand Jury was illegally obtained it would not vitiate the indictments. The Supreme Court of Ohio found that this was consistent with Federal procedure, and cited as authority *Costello v. United States*, 350 U.S., 359, in which this Supreme Court of the United States adopted the position previously expressed, that if indictments were to be held open to challenge on the ground that there was inade-

quate or incompetent evidence before the Grand Jury, the resulting delay would be great and that such delay would run counter to the whole history of the Grand Jury institution and that neither justice nor the concept of a fair trial required such a rule.

Even if such an advanced ruling were to be permitted, such ruling should be consistent with the decision in the case of Petitioner Glass, in that the activities of the Mansfield Police Department did not constitute a search, or at least if the same did constitute a search not an unlawful search. Such secret observations have been used for some time in both State and Federal matters, such as the use of cameras in public banks to identify and apprehend bank robbers. Such cameras are concealed and constitute a secret surveillance of all users, lawful or otherwise, of such banks.

Secret observations of acts or conversations, which do not involve a trespass, or which do not violate statutes, do not constitute a search. Such principle is best recognized in cases emanating from wire taps. Such wire taps are invalid solely because of federal communications statutes, or because such taps involve a direct trespass such as was present in *Silverman v. United States*, 365 U.S., 505. This principle was in effect recognized in *Rathbun v. United States*, 355 U.S., 107, in which the contents of a telephone call overheard by government agents on a regularly used telephone extension with the consent of one party to the conversation were admissible in Federal Court. The opinion pointed out that wire tapping as such was not an illegal search and seizure, but was prohibited solely by the federal wire tapping statute, which statute was for the purpose of protecting the means of communication and not the secrecy of the conversation.

It is further established that not every trespass constitutes a search where the closed privacy of the defendant is not invaded. The Petitioners herein had no closed privacy, but committed the acts in an open public room.

In *United States v. Simms*, 202 F. Supp., 65, it was held that a trespass on open fields was not an unlawful search and that the defendant was only protected in his own home from observations. Even that protection from observation was limited in that what might be observed by looking through a window was not subject to suppression as a search.

The concurring opinion in *Lanza v. New York*, 8 L. Ed. 384; 82 Sup. Ct., 1218, indicated that secret observations did not constitute a search. The opinion by the court indicated that if a question for the court had been raised, it was proper for the public officials to protect public areas whether by secret observations, secret taps or otherwise, so long as no confidential relationships were invaded.

II.

THERE IS NO CONFLICT OF DECISION

Petitioners primarily for authority rely upon determinations made by the California Courts. In view of the factual situation presented in such cases in which there were closed toilet booths, and in further view of the factual situation relating to Petitioners in which a substantially open room was involved, the California decisions are consistent with the Ohio determinations.

In *Bielicki v. Superior Court*, 21 Cal. Rept. 552; 371 Pac. 2d, 288, the court defined a search as follows:

> "A search implies a prying into hidden places for that which is concealed, and that the object searched for has been hidden or intentionally put out of the way."

Such a closed area was involved in Bielicki but not in the case of Petitioners.

The distinction was even more clearly recognized in the case of *Britt v. Superior Court*, 24 Cal. Rept. 489; 374 P.2d, 292, in which the court stated:

> "Of course, clandestine observations by police officers of premises devoted to common use by the general public—such as, for example, the shopping areas and public hallways, and elevators of the department store herein involved—is not prohibited by our decision in Bielicki."

The California Court thus recognized that such an observation of an open area devoted to common use for the general public was proper. It was such an area which was kept under surveillance by the Mansfield Police Department.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied as no federal question is presented in the cases of Petitioners Poore, Townsend and Nixon, as Ohio procedure only is involved and no constitutional question is presented by Petitioner Glass, in that no unconstitutional search existed.

Respectfully submitted,

GERALD A. DONAHUE,
1st Ass't. Attorney General.
State House,
Columbus, Ohio,
Counsel for Respondent.
REX LARSON,
WILLIAM F. MCKEE,
3 North Main Street,
Mansfield, Ohio.